

IN THE SUPREME COURT OF THE STATE OF ALASKA

R.G. (Father),

Petitioner,

v.

Supreme Court No. S-18046

State of Alaska. DHSS, OCS; P.G.  
(Mother); A.G. (Child); E.G. (Child);  
S.G. (Child); and Y.G. (Child); and  
Office of Public Advocacy, Guardian  
ad Litem

Respondents.

Trial Case No. 3PA-20-00151/152/153/154CN

**PUBLIC DEFENDER AGENCY MEMORANDUM REGARDING  
REPRESENTATION OF R.G. IN THIS PETITION FOR REVIEW**

**VRA AND APP. R. 513.5 CERTIFICATION**

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513, that the font used in this document is Arial 12.5 point.

R.G. filed this pro se petition for review objecting to the trial court's denial of his request for conflict-free counsel. R.G. alleges that the Public Defender Agency (Agency) provided him with ineffective assistance of counsel at a temporary custody hearing in a child-in-need-of-aid (CINA) case. The Agency has a concurrent conflict of interest regarding the claims raised by R.G. in this petition.<sup>1</sup> R.G. should therefore be appointed conflict-free counsel in this matter.

<sup>1</sup> The Agency is still appointed to represent R.G. in the underlying CINA case and is separately filing a petition in this court from the trial court orders denying the appointment of conflict counsel.

**I. The Agency has a Concurrent Conflict of Interest that Precludes it from Representing R.G. Regarding the Claim that the Agency has Provided him with Ineffective Assistance of Counsel.**

R.G. has repeatedly argued that the Agency has been ineffective in representing him. From R.G.'s perspective he has been thwarted at every turn in his effort to obtain conflict-free advice, attack the court's temporary custody order due to ineffective assistance of counsel, and create a record. Given R.G.'s concerns, the Agency argued below that the court should adopt the procedure similar to that used in criminal cases where a defendant seeks to withdraw a plea before sentencing because of alleged ineffective assistance of counsel; under that procedure, the Agency asked that conflict-free counsel be appointed to R.G. for the limited purpose of litigating his claim that the Agency provided him ineffective assistance of counsel.<sup>2</sup>

Although still appointed to represent R.G. in the underlying CINA case,<sup>3</sup> the Agency cannot argue that it was or is ineffective. The Agency has a concurrent conflict of interest under Alaska Rule of Professional Conduct 1.7.<sup>4</sup> A concurrent conflict exists when there is a significant risk that the representation will be limited by the personal interest of the lawyer. Neither the assigned attorney, nor other attorneys at the Agency, can argue that R.G. was provided with ineffective

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<sup>2</sup> See *Nelson v. State*, 440 P.3d 240 (Alaska 2019) (holding that criminal defendant is entitled to conflict counsel immediately after raising an ineffective assistance of counsel claim in the context of an attempt to withdraw plea).

<sup>3</sup> Order, 3PA-00151/152/153/154CN (June 10, 2021) (continuing appointment of Public Defender) (filed with this court on June 14, 2021).

<sup>4</sup> Alaska R. Prof. Conduct 1.7(a)(2) (a concurrent conflict exists when there is a significant risk that the representation will be materially limited by the personal interest of the lawyer).

1  
2 assistance of counsel because the litigation implicates the interests of the Agency  
3 attorneys in defending the competency of the representation.<sup>5</sup>

4 Litigation to address an ineffective assistance claim cannot be done by the  
5 same counsel alleged to be ineffective.<sup>6</sup> Justice Bolger aptly summarized the  
6 dilemma:  
7

8 There is no reason to believe a litigant would be able to make an  
9 adequate record when represented by the same counsel whose  
10 effectiveness is at issue. I believe we should simply decline direct  
11 review of these claims.<sup>[7]</sup>

12 The trial court's order for temporary custody includes highly adverse findings against  
13 R.G. and an order removing the children from his care.<sup>8</sup> R.G. should have been given  
14 conflict-free at the representation hearing so he could be advised and pursue his  
15 claim that the Agency had provided him with ineffective assistance of counsel.  
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18 <sup>5</sup> [R.G.] Motion to Appoint Conflict Counsel, 3PA-00151/152/153/154CN (April 12,  
19 2021) (attached as Exhibit C to State's Response to Petition). A similar concurrent  
20 conflict is discussed in *Nelson*, 440 P.3d at 244-46 (public defender attorneys had  
21 concurrent conflict of interest that would preclude them from arguing defendant who  
22 wanted to withdraw plea was provided with ineffective assistance of counsel by  
23 Agency attorney).

24 <sup>6</sup> *Chloe W. v. State, DHSS, OCS*, 336 P.3d 1258, 1271-73 (Alaska 2014) (Bolger,  
25 J. concurring).

26 <sup>7</sup> *Id.*; see also *Julia D. v. State*, 2013 WL 5314609 at \*5-6 (Alaska 2013) (in  
27 concurrence Justice Bolger objects to the review of ineffective claims on direct  
28 review because the parent had no opportunity to develop a record with conflict free  
counsel); see also *Wetherhorn v. API*, 156 P.3d 371, 383-384 (Alaska 2007)  
(declining to review claim of ineffective assistance because respondent had not  
sought relief in the trial court and developed a record for review), *overruled on other  
grounds* by *In re Naomi B.*, 435 P.3d 918 (Alaska 2019).

<sup>8</sup> Attachment A, Order Granting Temporary Custody Order; Order Denying Motion  
to Show Cause; Order Granting Long Term DVPO, 3PA-20-00151/152/153/154CN,  
3PA-20-00568/569/570/571CI (March 10, 2021).

**II. R.G. has a Right to Counsel for Purposes of this Petition as a Matter of Due Process.**

R.G. has a fundamental right to the care and custody of his children protected by due process under the state and federal constitutions.<sup>9</sup> R.G. also has a due process right to the effective assistance of counsel.<sup>10</sup> Under the CINA rules R.G. is entitled to be represented “at all stages of [CINA] proceedings.”<sup>11</sup> To guard R.G.’s parental rights consistent with his right to be represented at all stages of a CINA case, and his right to the effective assistance of counsel, R.G. should be appointed conflict counsel for purposes of this petition.

**CONCLUSION**

R.G. should not be forced to proceed pro se given the complexity of the representation issues and the fact that this court has not determined the appropriate procedure raising ineffective assistance claims in CINA cases.<sup>12</sup> R.G. should be appointed conflict-free counsel to litigate the claims raised in his petition regarding ineffective assistance of counsel.

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<sup>9</sup> *Jennifer L. v. State*, DHSS, OCS, 357 P.3d 110, 116 (Alaska 2015); UNITED STATES CONSTITUTION, amend. XIV; ALASKA CONSTITUTION, art. I, § 7.

<sup>10</sup> *V.F. v. State*, 666 P.2d 42, 47-48 (Alaska 1983) (parents have a right to effective assistance of counsel at termination under the due process clause of the Alaska Constitution); ALASKA CONSTITUTION, art. I, § 7.

<sup>11</sup> Alaska CINA R. P. 12(a).

<sup>12</sup> *Chloe W.*, 336 at 1266-67 (ineffective assistance claims in CINA cases are resolved as presented).

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ALASKA PUBLIC DEFENDER AGENCY

DATE 6/21/21



Linda R. Beecher  
Deputy Public Defender,  
Bar No. 8606041

I certify that on May 5, 2021 a copy of this document and its attachments was emailed to: R.G.,  
Katherine Demarest (AGO), Olivia Mackin (mother), Rachel Levitt (minors)

By: SB